IN THE

United States Circuit Court of Appeals

OF THE

Ninth Circuit

B. S. NUNN,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

No. 4419

Brief of Defendant in Error

Geo. T. Wilson,
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Filed this.....day of February, 1925.

.....,
Clerk, U. S. Circuit Court of Appeals.

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BRIEF OF DEFENDANT IN ERROR

ARGUMENT

In the brief filed by the plaintiff in error, there are five assignments of error all involving practically the same question. It is contended in each assignment that the information filed against the plaintiff in error in the District Court fails to state sufficient facts to constitute an offense under Section 3 of Title 2 of the National Prohibition Act, in

that it does not allege a time and place, when and where the possession of liquor was unlawful; and conversely, that the information fails to negative certain exceptions or defensive matters contained in Section 33 of the Act, namely, that the liquor in question was possessed by plaintiff in error in his private dwelling and intended for his personal use and that of his family and guests.

The exception contained in Section 33 of the National Prohibition Act and relied upon by plaintiff in error reads as follows:

"But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained therein; ***".

It will be noted, however, that Section 33 contains another provision:

"*** and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used."

This latter provision, read in connection with Section 32 of the Act, and both given their usual, ordinary and plain meaning, would appear to dis-

pose of this controversy, at least in so far as the statute itself is concerned. Section 32 provides in part:

"It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, ***".

At the trial of this case in the Court below the Government established the possession of seventy five gallons of intoxicating liquor in plaintiff in error at the time and in the District named in the information. The evidence showed the exact place of possession to be his dwelling. The intoxicating liquor, after being qualified as such, was received in evidence, and the Government rested. (T. of R. pages 22-26). Plaintiff in error offered no defense, but rested. (T. of R. page 27).

It is patent that had plaintiff in error successfully established, as against the charge of unlawful possession of seventy five gallons of intoxicating liquor, that the liquor was lawfully acquired and possessed by him in his private dwelling and was intended solely for his own consumption and that of his family and guests, those facts would have constituted a complete defense. And by the provision of Section 33, above quoted, the burden of proving those very facts rested upon the plaintiff in error,

and the burden was not upon the Government in the first instance to negative or disprove them. In short, those facts are purely defensive matters, and as such, by the provisions of Section 32 it was not incumbent upon the Government to negative that defense in the information.

However, the exception contained in Section 33 is not the only one noted in the act. And, if the views of the plaintiff in error are to prevail, the rule of pleading he contends for would require the Government to negative every exception in the act, by the provision of which the possession of liquor is unlawful. When a person is charged with unlawful possession of liquor, he has available to him one or more of many defenses, any one of which, if successfully established, would defeat the Government's case. He may show, as against the charge of unlawful possession, a legal permit to possess the liquor, that such possession was in his dwelling and intended for the use of himself and that of his family and guests, that the liquor had been acquired and used for medicinal purposes, that he is conducting a bona fide hospital or sanitarium for the relief of alcoholism and the liquor was possessed and used solely for that purpose, or that he was a minister, priest or rabbi and as such possessed wine solely for the administration of the sacrament.

The possession of intoxicating liquor under any of these conditions and circumstances would be a

lawful one, and to follow the argument of plaintiff in error to its logical conclusion, it would be incumbent upon the Government in the first instance to negative every such condition and circumstance in its indictment or information, and to disprove the same upon the trial. Instead, then, of the simple pleadings and procedure provided by Sections 32 and 33, the indictment or information and the trial thereon would be a rather formidable affair. And, in our humble judgment, it was the intention of Congress, in enacting the provisions of those sections, and also of Section 3, to the effect that all the provisions of the act shall be liberally construed, to obviate that very contingency.

Even though Section 32 had been omitted from the National Prohibition Act, we are convinced that the general rule on pleading an exception, or proviso, contained in a criminal statute does not require the Government to go to the length in its indictment or information contended for by the plaintiff in error. Before discussing that rule, however, we desire to direct the Court's attention to the authorities cited by plaintiff in error in support of his position. With one or two exceptions, we do not believe he derives very much comfort from those decisions.

In the case of Hilt vs. United States, 279 Fed. 421, (Brief of plaintiff in error, page 8), the Circuit Court of Appeals for the Fifth Circuit reversed the ruling of the trial Court for failure of the

indictment, in any way, to show an unlawful possession. But it does not appear that the court's ruling was based upon failure of the indictment to include certain defensive negative averments. In a later case, however, Powell et al vs. United States, 294 Fed. 512, the same court explained and distinguished its decision in the former case, and held directly that it was not necessary to include in the indictment any defensive negative averments. The indictment in the latter case alleged that the liquor was intended for use for beverage purposes, while in the former case the indictment was entirely barren of any allegation indicating an unlawful possession. In the case at bar the information charges in part:

"*** Which said intoxicating liquor was then and there fit for use for beverage purposes, he, the said B. S. Nunn, then and there having no lawful permit to possess the said intoxicating liquor;***".

These allegations, we submit, distinguishes the instant case from Hilt vs. United States and brings it within the decision in Powell vs. United States.

The rule for pleading an exception contained in a criminal statute, as set forth in the case of Anderson vs. United States, 294 Fed. 596, (Brief of plaintiff in error, page 9), will be the subject of further discussion in a later portion of this brief. Suffice to say at this point that it is the contention

of the Government that the case at bar comes squarely within the latter portion of that ruling.

Likewise, the cases of Hockett et al vs. United States, 265 Fed. 588; Davis et al vs. United States, 274 Fed. 928; Dukich vs. United States, 296 Fed. 692; Singleton vs. United States, 290 Fed. 130; and Panzich vs. United States, 285 Fed. 871, (Brief of plaintiff in error, pages 9, 11, 15), will be discussed more fully under our own authorities.

In the case of Bell vs. United States, 285 Fed. 145 cited by plaintiff in error, (Brief of plaintiff in error, page 12), it does not appear from the court's decision whether or not, in the opinion of the court, any less allegation than that set out in the indictment, would be sufficient. But assuming that it was the intention of the Court to say that the indictment or information by positive allegation must negative every exception noted in the statute, we are nevertheless convinced that the Court erred in applying that rule to pleadings under the prohibition act, that the weight of authority is to the contrary and that the rule as laid down in our own Ninth Circuit is the correct one.

While the case of United States vs. Cleveland, 281 Fed. 249, (Brief of plaintiff in error, page 12), appears to be squarely in point with the case at bar, we submit, that, however startling the learned judge's views may appear as expressed in that

decision, it loses entirely its force, erudition and authority when considered in connection with Singleton vs. United States, 290 Fed. 130, and Judge Rose's comment on it as expressed in the latter case.

The case of United States vs. Descy, 284 Fed. 724, has no application whatever to the case at bar. In that case, the only issue was the legality of the search of the defendant's premises raised by defendant's petition to suppress the evidence acquired by the search. The Court held that the question of the lawful or unlawful possession of the liquor seized was not involved, and properly so.

We agree with the decision in United States vs. Ellig, 288 Fed. 939, (Brief of plaintiff in error, page 12), wherein it is stated that something more than the bare conclusion of the pleader is required to give vitality to the pleading. In the instant case, the information sets forth the intended use of the liquor and also the possession thereof without permit (T. of R. page 2), hence, we doubt the application of that case to the one at bar. We are of the further opinion that that case is at war with the decision in Rulovitch vs. United States, 286 Fed. 315 decided by the Circuit Court of Appeals of the same circuit.

The case of the United States vs. A Quantity of Intoxicating Liquor, 289 Fed. 278 (Brief of plaintiff in error, page 13), is in the same category with

United States vs. Descy, 284 Fed. 724, and involves only the question of illegal seizure and hence has no application to the case at bar.

The case of United States vs. Boasberg, 283 Fed. 305, (Brief of plaintiff in error, page 13), in so far as it attempts to establish a rule of pleading applicable to the prohibition act, is contrary to the weight of authority on that question. This same case was submitted to the United States Supreme Court by the Government (260 U. S. 756), but unfortunately dismissed by that Court without any decision on the controverted questions.

The foregoing brief review of the decisions cited by plaintiff in error establishes that there are few, if any, really safe, competent and recognized authorities supporting his position. What authorities he has cited are in a hopeless minority, and in the light of long established and well recognized rules for pleading offenses denounced by our criminal statutes, do not express the law as we find it. The authorities submitted by the Government, we believe to be controlling, and these authorities we have attempted to follow in drawing our informations and indictments for offenses under the National Prohibition Act.

ANTHORITIES

The five assignments of error, involving, as they

do, practically the same question, will be considered together. That question, and the only one so far as we can gather from the Bill of Exceptions and the brief of plaintiff in error, involves the rule for pleading an exception in a criminal statute as applied to the information, drawn under Section 3 of Title 2 of the National Prohibition Act in the case at bar.

In United States vs. Cook, 84 U. S. 163; and again in Anderson vs. United States, 294 Fed. 593, the rule for pleading an exception noted in a criminal statute is announced, as follows:

"Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception, but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception (indictment), the pleader may safely omit any such references, as the matter contained in the exception is matter of defense and must be shown by the accused."

This Court has had occasion several times to

apply this rule in cases coming before it involving statutes similar in their provisions and exceptions to the National Prohibition Act.

In Shelp et al vs. United States, 81 Fed. 694, 696, one of the questions presented to this Court was that the indictment failed to negative the exceptions contained in a statute reading in part as follows:

"*** and the importation, manufacture, and sale of intoxicating liquor in said district except for medicinal, mechanical and scientific purposes is hereby prohibited ***".

In passing upon the sufficiency of that indictment, this Court remarked:

"The exception stated in the statute does not either define or qualify the offense created by the statute. The offense designated in the statute is the sale of intoxicating liquors in Alaska. This can be properly stated without any reference to the exception. There is nothing in the exception that enters into the offense condemned by the statute. The exception is purely a matter of defense, which, if relied upon, could readily have been proved by the defendants. A careful examination of the authorities will show that it is only necessary in an indictment for a statutory offense to negative an exception to the statute when that exception is such as to render the negative of it an essential part of the definition or description of the offense charged."

See also United States vs. Nelson, 29 Fed. 202, 209 (D. C. Oregon); Nelson vs. United States, 30 Fed. 112, 116, (C. C. A. 9th Circuit).

The case of Hockett et al vs. United States, 265 Fed. 588, 590, (C. C. A. 9th Circuit), grew out of a violation of the Reed Amendment, which excepted from its operation shipments of liquor in interstate commerce for scientific, medicinal, sacramental and mechanical purposes. The indictment failed to negative the excepted portion of the statute, but this Court, following its earlier decision in Shelp vs. United States, (Supra) held that the exception need not be negatived.

In the foregoing cases, it will be noted that the exception was included in the enacting clause of the statute in question. Yet, in each instance, this Court held the exception constituted no part of the definition of the offense. On the other hand, the prohibition act does not contain the exception in the defining portion of the statute, but merely words of reference thereto. (Section 3, Title 2, National Prohibition Act). This we believe to be additional reason for omitting from the indictment or information any reference to the exception; and this is apparently the view expressed by this Court in

Davis et al vs. United States, 274 Fed. 928, 929. Reading from page 929 of that decision, the Court said:

"That portion of the language of Section 3, which defines the offense which it was alleged in the indictment it was the purpose of the conspiracy to commit, is entirely separable from that portion thereof permitting the use of intoxicating liquor for non-beverage purposes. In addition to that fact, Section 3 declares that all the provisions of the act shall be liberally construed, to the end that use of intoxicating liquor as a beverage may be prevented, and Section 32 provides that it shall not be necessary in any indictment 'to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful'. ***".

In Panzich et al vs. United States, 285 Fed. 871, 873, this Court held the burden of proof rested upon the defendant to show that liquor found at his residence was lawfully acquired, possessed or used.

It is a favorite contention of plaintiff in error in this case that the information fails to show the liquor was possessed at any particular place. (T. of R., pages 4, 5). (Brief of plaintiff in error, pages 2, 3).

But in Dukich vs. United States, 296 Fed. 692, this Court held in effect, that it was not necessary to state in the information the place where the liquor was possessed, in view of the provision of Section 32 of the prohibition act, that it shall not

be necessary to include any defensive negative averments in the information.

Other Circuits have adopted and expressed the same views as this Court. Like this Court, they have refused to restrict the application of the plain terms of the prohibition act, as contended for by plaintiff in error in the instant case, and have given to the act the full force of its provisions as was undoubtedly intended by its framers.

In the Fourth Circuit, the Circuit Court of Appeals in two well considered decisions have held, that all the Government need show, in the first instance, is the mere possession in the accused, and that the burden then shifts to the accused to show a lawful possession.

Barker vs. United States, 289 Fed. 249.

Singleton vs. United States, 290 Fed. 130.

In Massey vs. United States, 281 Fed. 293, the Circuit Court of Appeals for the Eighth Circuit, likewise decided that it is not necessary in the information or indictment to negative the lawful purposes for which the accused might have possessed the liquor.

See also United States vs. Jones et al, 298 Fed. 131, 133 (D. C., Illinois, 7th Circuit.)

These decisions, in our opinion, amply sustain the validity of the information in the case at bar.

But we note in the brief of plaintiff in error (p. 14), that some criticism of the evidence adduced at his trial is offered, to the effect that the Government's evidence was entirely silent as to any fact inconsistent with a lawful possession of the liquor by him. This we dispute. While it is not contained in the Bill of Exceptions and consequently not in the Transcript of the Record, yet on pages 22, 23 of the Reporter's transcript of evidence, we find that the wife of the defendant was in the act of destroying one of the gallon bottles of liquor at the time the officers entered the house. And again, on page 15 of the Reporter's transcript, the evidence shows that the two large barrels of whiskey introduced in evidence were secreted immediately beneath the floor of the bath room and that access to them was gained by sliding a loose board of the bath room floor to one side. It appears from the evidence that this clever device was not readily discernible. In the opinion of plaintiff in error, apparently this evidence does not indicate a guilty knowledge of unlawful possession of liquor. While this may be so, it at least indicates an extreme self-consciousness of his possession of such a large quantity of liquor. Needless to say, both the Court and jury were well satisfied as to his guilt.

In closing this review of authorities on the question involved in this Writ of Error, we call the attention of this Court to the words of Judge Rose in Singleton vs. United States, 290 Fed. 130, 132, wherein he says:

"One who has become legally possessed of intoxicants may keep them in his dwelling. He may obtain a permit for them, but he is not required to do so; but, if the rightfulness of his having them is legally challenged, the burden is upon him to show that he lawfully obtained, keeps and uses them. There is nothing harsh or oppressive in such construction. He always knows how he procured the liquor and frequently no one else does * * *".

To hold that the Government officers must be able to show, beyond a reasonable doubt, when and where the accused obtained the liquor, and its intended use, would be placing an obstacle in the path of enforcing this act that would completely defeat its purpose. No one, as the learned judge well said, knows better than the accused where and when he obtained the liquor, or the purpose for which he did obtain it; and no one is in a better position than he to enlighten the Court and the jury upon these facts. And when Congress placed upon the accused the burden of proving the lawful possession, it put into the hands of those charged with the enforcement of the act the means by which that result could be accomplished. The prohibition act in this provision does not differ materially from some other criminal statutes of our Federal Government, notably, the Narcotic Drug Acts and the Tariff Act. In the latter acts, all that is required to be shown by the Government, in order to establish a prima facia case, is the possession of the drug or of the merchandise in the accused, and the

burden of the evidence then shifts to accused to show a lawful possession.

In conclusion, we submit that the trial court did not err in any of its rulings affecting this case, that accused was granted a fair trial, that the evidence amply justified a verdict of guilty at the hands of the jury and that the judgment of conviction of the District Court should be affirmed.

Respectfully submitted

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